

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
March 26, 2012 Session

DAVID SMITH v. GERDAU AMERISTEEL, INC.

**Appeal from the Chancery Court for Madison County
No. 67268 James F. Butler, Chancellor**

No. W2011-01399-WC-R3-WC - Mailed August 2, 2012; Filed September 5, 2012

In this claim for workers' compensation benefits, the employee suffered a compensable back injury. The trial court awarded 85% permanent partial disability to the body as a whole and additional temporary total disability benefits, resulting in an award of 400 weeks of benefits. The employer has appealed, asserting that the permanent partial disability award is excessive and that the trial court erred by awarding additional temporary total disability benefits. We affirm the judgment of the trial court.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right;
Judgment of the Circuit Court Affirmed**

JANICE M. HOLDER, J., delivered the opinion of the Court, in which DONALD P. HARRIS, SR. J., and TONY A. CHILDRESS, SP. J., joined.

Michael L. Mansfield, Jackson, Tennessee, for the appellant, Gerdau Ameristeel, Inc.

Spencer R. Barnes, Jackson, Tennessee, for the appellee, David Smith.

MEMORANDUM OPINION

Factual and Procedural Background

David Smith worked for Gerdau Ameristeel, Inc., ("Ameristeel") as a locomotive mechanic. He injured his lower back on October 9, 2008, while operating a truck-mounted crane. Mr. Smith was referred to a local clinic for medical treatment after reporting the injury. He was subsequently referred to Dr. John Brophy, a neurosurgeon. Dr. Brophy diagnosed a herniated disk at the L5-S1 level of the spine. A brief period of conservative

treatment did not improve Mr. Smith's symptoms of back and right leg pain. Dr. Brophy therefore performed a laminectomy on January 2, 2009. The surgery successfully decompressed the right S1 nerve root. Mr. Smith's symptoms, however, continued with virtually no improvement. Dr. Brophy characterized the continued symptoms as neuropathy unrelated to the work injury.

Dr. Brophy continued to provide conservative treatment, including epidural steroid injections, various medications, and a work conditioning program. These measures were ultimately unsuccessful. Dr. Brophy released Mr. Smith to return to work without restrictions on June 4, 2009. In his deposition, Dr. Brophy testified that Mr. Smith retained a 9% anatomical impairment to the body as a whole as a result of his work injury. Dr. Brophy provided no explanation for his impairment rating.

Ameristeel referred Mr. Smith to Dr. Kenneth Warren. Dr. Warren, in turn, referred Mr. Smith to Dr. Marcus Meekins, a pain management specialist. Dr. Meekins first saw Mr. Smith on June 10, 2009. He also characterized Mr. Smith's continued symptoms as neuropathy related to the work injury. Dr. Meekins believed Mr. Smith suffered from permanent neuropathy caused by a herniated disc. Dr. Meekins recommended a temporary implantation of a device known as a "dorsal column stimulator." The results of the implantation were positive, and in September 2009, Dr. Meekins referred Mr. Smith to Dr. Eric Akin, a neurosurgeon, for implantation of a permanent device.

Dr. Akin implanted a permanent dorsal column stimulator in Mr. Smith's back on September 29, 2009. Initially, the device provided Mr. Smith with significant relief from his symptoms. Dr. Akin released Mr. Smith from his care without restrictions on October 30, 2009. Mr. Smith returned to Dr. Akin in April 2010, however, and advised him that he was no longer receiving adequate relief from the stimulator. Dr. Akin initially assigned Mr. Smith a 12% impairment to the body as whole. During his deposition, however, Dr. Akin testified that he later concluded that 23% to the body as a whole was the correct impairment. He explained that the 23% impairment rating included the two prior back surgeries Mr. Smith had undergone in 2003 and the 14% impairment Mr. Smith had as a result of the 2008 injury. Dr. Akin conceded that he had not followed the protocols of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition.

After implantation of the stimulator, Mr. Smith returned to Dr. Meekins, who prescribed various types of pain medication, including Lyrica, hydrocodone, Tramadol, and Percocet. Dr. Meekins recommended a functional capacity evaluation in July 2010. He testified that there was difficulty in obtaining approval for the evaluation from the workers' compensation insurer. Alexander Luy, a physical therapist, performed the evaluation in December 2010. Mr. Luy concluded that Mr. Smith was not capable of returning to his job

as a locomotive mechanic. Mr. Luy also found that Mr. Smith's effort was variable and that "considerable question should be drawn to the reliability and accuracy of Mr. Smith's reports of pain and disability." At the time of his deposition, Dr. Meekins' file did not contain the report of the evaluation.

Dr. Meekins ultimately concluded that Mr. Smith reached maximum medical improvement on March 1, 2011, the last day that he treated Mr. Smith. Dr. Meekins instructed Mr. Smith not to lift or carry anything in excess of twenty pounds and to avoid lifting or carrying anything in excess of ten pounds.

Dr. Samuel Chung, a physiatrist, evaluated Mr. Smith at the request of Mr. Smith's attorney on December 7, 2009. In Dr. Chung's opinion, Mr. Smith had sustained a 17% impairment to the body as a whole due to the October 2008 injury. Dr. Chung recommended that Mr. Smith "avoid prolonged walking, standing, stooping, squatting, bending, climbing, and excessive flexion, extension, and rotation of his back." He believed that Mr. Smith reached maximum medical improvement on October 29, 2009, the date assigned by Dr. Akin. Dr. Chung testified that at the time of his examination Mr. Smith "had ample enough time to recover from his condition and he was static at that point, meaning he wasn't improving that much and he wasn't going backwards. He was having ongoing symptoms. I do not think this condition would improve that much more."

Mr. Smith filed a complaint for workers' compensation benefits on September 20, 2010, in the Chancery Court for Madison County. On the date of trial, April 25, 2011, he was fifty-seven years old. He attended school into the tenth grade and had no additional formal education. He began working for a predecessor entity of Ameristeel in 1981 as a crane operator. He later became a switch engine operator and weight station technician. These positions allowed him to learn how to work on locomotives, and he became a locomotive mechanic. Prior to working for Ameristeel, Mr. Smith had been a welder, a vending machine repairman, and a heavy equipment operator.

Mr. Smith previously injured his back in 2003, which resulted in two surgeries. Ultimately, Mr. Smith had been able to return to work without restrictions and without difficulty until October 2008. In 2009, after his October 2008 injury, Mr. Smith returned to work for Ameristeel and continued until April 2010, when Dr. Meekins prescribed narcotic pain medication to alleviate his back pain. Ameristeel's internal policies did not permit the use of narcotics in the workplace, and Mr. Smith retired in September 2010.

Mr. Smith testified that he did not believe he was physically capable of returning to his position at Ameristeel or to any of his previous jobs. He reported that he had pain in his lower back and right leg. He was able to mow his yard or drive a tractor for an hour before

having to stop, take a pain pill, and rest for an hour in a recliner. The longest distance he was able to drive a car or ride in a car was from his home in Cedar Grove, Tennessee, to Jackson, Tennessee.

During cross-examination, Mr. Smith testified that he had received extensive on-the-job training and had attended seminars during his tenure with Ameristeel. He agreed that he was “mechanically inclined,” had learned how to repair vending machines while working for a previous employer, and had extensive knowledge concerning the repair of locomotives. At the time of trial, Mr. Smith was regularly taking oxycontin, a narcotic pain medicine. Since his retirement, Mr. Smith has not looked for work or investigated additional education or training.

The trial court took the case under advisement and issued its decision in the form of a letter to counsel. The court adopted the impairment rating of Dr. Chung, 17% to the body as a whole. It found that Mr. Smith had sustained an 85% permanent partial disability. The trial court awarded additional temporary disability benefits using Dr. Meekins’ date of maximum medical improvement, March 1, 2011, rather than the October 2009 date given by Drs. Akin and Chung. The trial court entered a judgment stating that when the amount of the permanent partial disability and temporary total disability awards were combined with the temporary total disability benefits voluntarily paid to Mr. Smith, the award exceeded the statutory maximum benefit of 400 weeks. See Tenn. Code Ann. § 50-6-102(13)(C) (2008). The award of permanent partial disability benefits was therefore modified to 304 weeks. Ameristeel has appealed, contending that the award of permanent partial disability benefits is excessive and that the trial court erred by awarding additional temporary total disability benefits. The appeal has been referred to the Special Workers’ Compensation Appeals Panel for a report on the findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 51, § 1.

Analysis

Extent of Permanent Disability

Ameristeel asserts that the trial court erred by adopting Dr. Chung’s impairment rating as the basis for the disability award, rather than Dr. Brophy’s rating. In support of this argument, Ameristeel points out that Dr. Brophy, as a treating physician, observed Mr. Smith over a longer period of time and thus had first-hand knowledge of the nature of the injury and its subsequent course. Ameristeel notes that Dr. Chung saw Mr. Smith on only one occasion in connection with the litigation of Mr. Smith’s claim. Ameristeel further points out that Dr. Chung’s impairment rating was based on his finding that Mr. Smith had residual radiculopathy from the injury, a finding that Ameristeel contends is inconsistent with Dr. Brophy’s opinion that Mr. Smith had only non-verifiable radicular complaints.

We review a trial court's determination of factual issues in a workers' compensation case "de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (2008); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Questions of law are reviewed de novo with no presumption of correctness afforded to the trial court's conclusions. Cloyd v. Hartco Flooring Co., 274 S.W.3d 638, 642 (Tenn. 2008).

When expert medical testimony differs, it is within the trial court's discretion to accept the opinion of one expert over another. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 676-77 (Tenn. 1983). The trial court observed that Dr. Chung gave a more detailed explanation of the method and reasoning he used to arrive at his conclusion than did Dr. Brophy.

The trial court also heard the live testimony of Mr. Smith concerning his symptoms and made a specific finding that Mr. Smith was a credible witness. When issues of credibility of witnesses and the weight to be given their in-court testimony are before the reviewing court, considerable deference must be accorded to the factual findings of the trial court. Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 733 (Tenn. 2002). Mr. Smith's testimony was consistent with medical evidence that he had moderate to severe right leg pain from October 2008 through the date of trial. All medical testimony was taken by deposition. We give deference to the trial court when it has weighed out-of-court testimony in conjunction with in-court testimony. Cunningham v. City of Savannah, No. W2010-02411-WC-R3-WC, 2012 Tenn. LEXIS 145 at *17-18 (Tenn. Workers' Comp. Panel Feb. 28, 2012).

The characterization of Mr. Smith's symptoms as either "radiculopathy" or "non-verifiable radicular complaints" is the type of disagreement among medical experts that courts frequently resolve in workers' compensation matters. Dr. Brophy noted Mr. Smith's complaints of pain in his right leg and foot but termed them "non-verifiable radicular complaints" because the post-operative MRI did not positively reveal nerve root compression. Dr. Chung testified that Mr. Smith's history of radicular complaints was clinically verified by positive straight leg raising tests, a decrease in reflexes, and a loss of sensation in the S1 dermatomal nerve distribution. The trial court accredited Dr. Chung's testimony in determining Mr. Smith's impairment rating, which is within the trial court's discretion. Hinson, 654 S.W.2d at 676-77. Considering all of these factors, we conclude that the evidence does not preponderate against the trial court's finding that Mr. Smith sustained a 17% anatomical impairment from his injury.

Ameristeel also argues that the award of 85% permanent partial disability was excessive because Mr. Smith “has technical skills and experience that are transferable to a wide variety of occupations, despite his limited formal education.” The record, including Mr. Smith’s own testimony, certainly supports the conclusion that he is adept at understanding and repairing various types of machines. Nevertheless, the evidence also demonstrates that Mr. Smith was unable to return to any of the jobs he had previously performed. He was fifty-seven years old and did not complete his high school education. Apart from a few general statements concerning his ability to read newspapers and the like, there was no evidence concerning his current abilities to read, write, or perform mathematics or any evidence regarding his potential for obtaining additional education.

Moreover, there was significant disagreement among the doctors concerning the appropriate medical restrictions. Drs. Brophy and Akin placed no limitations on Mr. Smith’s activities, but Drs. Chung and Meekins suggested significant limitations. Additionally, Mr. Smith’s continued use of narcotic pain relievers limits his employability as evidenced by Ameristeel’s policy of denying employment to persons taking narcotics. Under these circumstances, we are unable to say that the evidence preponderates against the trial court’s conclusion concerning the extent of Mr. Smith’s disability.

Maximum Medical Improvement

The trial court accepted Dr. Meekins’ testimony that Mr. Smith reached maximum medical improvement on March 1, 2011, rather than the testimony of Drs. Brophy, Akin, and Chung that Mr. Smith reached maximum medical improvement at an earlier date. As previously noted, this finding resulted in an award of an additional thirty-seven weeks of temporary total disability benefits. Mr. Smith had previously received fifty-nine weeks of temporary total disability, paid voluntarily by Ameristeel. Thus, the combination of fifty-nine weeks of temporary total disability benefits, the awarded thirty-seven weeks of additional temporary total disability benefits, and 340 weeks of permanent partial disability benefits totaled 436 weeks. The parties stipulated that Mr. Smith was entitled to receive the maximum weekly benefit. Therefore, the award exceeded the maximum 400-week total benefit permitted by Tennessee Code Annotated section 50-6-102(13)(C). In its judgment order, the trial court reduced the number of weeks of permanent partial disability benefits to 304, resulting in a total award of 400 weeks of benefits.

Temporary total disability benefits are intended to compensate the employee during the period he is recuperating from his injury and is unable to work. Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 778 (Tenn. 2000). Temporary total disability benefits will cease when the employee is either able to return to work or the employee has reached maximum medical improvement. Simpson v. Satterfield, 564 S.W.2d 953, 955 (Tenn. 1978).

Maximum medical improvement occurs when the injured employee reaches the highest degree of recovery that the treating physician believes can be achieved.¹ See Sanders v. Lodgenet Interactive Corp., No. M2011-00725-WC-R3-WC, 2012 Tenn. LEXIS 64 at *14 (Tenn. Workers' Comp. Panel Feb. 10, 2012), aff'd per curiam, 2012 Tenn. LEXIS 61 (Tenn. 2012).

At the time of trial, Dr. Meekins was Mr. Smith's only treating physician. Dr. Akin ceased treating Mr. Smith in 2010 and Mr. Smith had stopped seeing Dr. Brophy in 2009. Although the trial court found all four doctors to be credible, the trial court accepted Dr. Meekins' March 1, 2011, maximum medical improvement rating because "Dr. Meekins . . . [was] monitoring [Mr. Smith's] pain management and the effectiveness of the stimulator and [saw Mr. Smith] in a different light and also at a later time."

The trial court also noted that Mr. Smith was "a credible witness in his own behalf and his testimony as to his injuries and how it affects him is considered along with the medical evidence and any other proof." Mr. Smith testified that he continued to experience burning and throbbing in his back and numbness in his toes. The trial court selected Dr. Meekins' maximum medical improvement date after hearing Mr. Smith's in-court testimony, and we give deference to the trial court's determination. See Cunningham, 2012 Tenn. LEXIS 145 at *17-18.

Dr. Meekins treated Mr. Smith's pain symptoms until he concluded in March 2011 that Mr. Smith would likely experience pain for the remainder of his life. Although Mr. Smith's complaints of pain did not improve over time, Dr. Meekins continued to provide different treatments in an effort to reduce Mr. Smith's pain level. Between June 2009 and March 2011, Dr. Meekins changed Mr. Smith's medications, modified Mr. Smith's restrictions, and requested a functional capacity evaluation. Dr. Meekins also discussed with Mr. Smith other treatment options, which were ultimately denied by Mr. Smith's workers' compensation insurance carrier. It was not until March 1, 2011, that Dr. Meekins could determine that Mr. Smith had recovered as far as his injury would permit. We do not believe that maximum medical improvement can be determined using the benefit of hindsight. A reviewing court should not use an employee's lack of improvement over time as the basis for adopting an earlier maximum medical improvement date.

¹ We observe that had Mr. Smith's injury occurred after July 1, 2010, Tennessee Code Annotated section 50-6-207(1)(E) would apply. Section 50-6-207(1)(E) provides that a treating physician may refer an injured worker for pain management treatment if the pain persists beyond the expected amount of time for healing. The employee is presumed to have reached maximum medical improvement at the earlier of 104 weeks after pain management treatment begins or at the date chosen by the physician. Tenn. Code. Ann. § 50-6-207(1)(E)(i-ii).

The trial court also did not err in accepting Dr. Meekins' maximum medical improvement date in conjunction with Dr. Chung's impairment rating. Dr. Meekins' testimony sufficiently established that he was unable to relieve Mr. Smith's pain symptoms during the time Dr. Meekins treated Mr. Smith. Despite Dr. Meekins' efforts, Mr. Smith's condition did not change between Dr. Chung's December 7, 2009 evaluation and Dr. Meekins' assignment of maximum medical improvement on March 1, 2011. Thus, the trial court's reliance on Dr. Chung's earlier evaluation was not misplaced.

Conclusion

The judgment of the trial court is affirmed. Costs are taxed to Gerdau Ameristeel, Inc., and its surety, for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

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**Chancery Court for Madison County
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No. W2011-01399-WC-R3-WC - Filed September 5, 2012

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Gerdau Ameristeel, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM